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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 908 21

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, ET AL.,
Petitioners,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD, A CORPORATION, AND FARMERS GRAIN COMPANY, A CORPORATION, ET AL.,
Respondents.

ANSWER OF RESPONDENT RAILROAD TO MOTION OF PETITIONERS FOR ORDER AUTHORIZING ABBREVIATION OF PRINTED RECORD.

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Attorney for the Respondent, Toledo, Peoria & Western Railroad.

THE DUNHOOP-WARREN PRINTING COMPANY, 330 WEST JACKSON, CHICAGO

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MAY IT PLEASE THE COURT:

The Petitioners' motion is an attempt to avoid the normal and customary procedure on petition for a writ of certiorari, as prescribed in Rule 38 of the rules of this Court. That Rule provides in Paragraph 8:

> "Where it is necessary to print the record for the use of this court counsel should stipulate to omit from the printed record all matter not essential to a consideration of the questions presented by the petition for the writ, and when it is shown that unnecessary parts of the record have been printed although a reasonable

> effort was made by one of the parties to secure the printing of a proper record, such order as to costs may be made as the court shall deem proper."

In this case there was no printed record before the Circuit Court of Appeals. It is clear from the rule that Petitioners have the responsibility of furnishing to this Court a proper printed record sufficient for its consideration of the questions presented, that Petitioners should make a reasonable effort to obtain a stipulation of counsel as to what portions of the record should not be printed, and that their alternative upon a failure to obtain such a stipulation is to print the entire record and proceed against Respondents for costs. It is equally clear that Respondent Railroad has a duty to make a reasonable effort to stipulate, so as to secure a proper printed record, and upon its failure to do so to reimburse Petitioners for costs unjustly sustained.

Instead of complying with that rule, Petitioners are asking this Court to decide, without any record before it, that only a small portion of the record (and none of the testimony) is essential to a consideration of the questions involved in this case. Petitioners apparently seek to justify such a departure from the rule on the following grounds:

1. Counsel for Respondents have declined to agree to a stipulation; and

2. The findings of fact of the District Court are conclusive because they were not altered by the Circuit Court of Appeals.

The first of these grounds is not true; the second is a misconception of the opinion of the Circuit Court of Appeals.

Petitioners state, on page 3 of their motion, that their counsel proposed to all counsel in the case that they endeavor to stipulate as to the omissions from the record to be printed, that a proposed stipulation was prepared by

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their counsel, and that counsel for Respondents declined to agree to a stipulation and proposed no alternative.

Respondent Railroad has no means of knowing whether a form of stipulation of proposed omissions was prepared by counsel for Petitioners, but no such proposed stipulation was ever presented to, or seen by, Respondent Railroad or its counsel.

The accuracy of the two other statements can best be tested against the following specific facts:

At approximately 4:00 o'clock P. M. on January 7, 1947, Mr. Louis F. Knoblock, Petitioners' counsel in Peoria, Illinois, delivered to the office of counsel for Respondent Railroad, in his absence, a typewritten list of what appeared to be some of the items in the record of this case. That list was approximately the same as the list now contained in Petitioners' motion, except that it included approximately ten per cent of the testimony in the record.

At approximately 11:00 o'clock on the following morning, January 8, 1947, counsel for Respondent Railroad asked Mr. Knoblock what that list represented. Mr. Knoblock stated that it consisted of the items which Mr. Heiss (Petitioners' counsel in Cleveland, Ohio) believed were necessary in the record on Petitioners' application for certiorari. Counsel for Respondent Railroad advised Mr. Knoblock that he would be willing to work out a stipulation as to what should be contained in the printed record, but that he believed that some additional items would be needed. Mr. Knoblock stated that he had no authority to work out any stipulation, and that his definite instructions from Mr. Heiss were that if Respondent Railroad would stipulate that the record should contain the items described in that list, by not later than 3:00 o'clock in the afternoon on that day, a stipulation should be prepared and executed, but that unless Respondent Railroad agreed precisely to that list,

effectively rejected by the Circuit Court of Appeals when it stated:

> "It is undisputed that these troubles have never been alleviated by the officers referred to. Whether this was due to the officers' inactivity, inability or beyond the scope of their duty is immaterial at the present time. This condition has existed so long that it has become a stench in the nostrils of patriotic citizens of Illinois, and it should be stopped by due process of law." (158 F. (2d) 109, 118.)

In view of the discrepancies between the facts found by the District Court and those found by the Circuit Court of Appeals, there is no basis for Petitioners' contention that the findings of the District Court should be accepted by this Court as true. If these discrepancies are to be resolved, it would appear that this Court must have before it the pertinent testimony. The motion of Petitioners for abbreviation of the record does not contemplate the printing of any of the testimony. Such a record would be wholly inadequate for a proper review of this case.

Not only is the record suggested by Petitioners inadequate, but it is improper, because it includes motions and orders in the District Court pursuant to the mandate issued on November 27, 1946. Those motions and orders were not a part of the record before the Circuit Court of Appeals, whose judgment is herein sought to be reviewed, and they have not been certified as a part of any record to the Clerk of this Court. The District Court record of which they are a part discloses that an appeal was perfected by Petitioners from those orders to the Circuit Court of Appeals on January 18, 1947. Since those matters are now before that Court, they have no place in the record on this petition for certiorari.

It is, therefore, respectfully submitted that the motion of Petitioners for an order authorizing abbreviation of the

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printed record in this case should be disallowed for the following reasons:

1. No reasonable effort to secure a stipulation as to the omissions from the record to be printed has been made by Petitioners;

2. The record suggested by Petitioners is wholly inadequate for a consideration of the questions presented by the petition for a writ of certiorari; and

3. The record suggested by Petitioners is improper in that it includes matters not now subject to review in this Court.

DONALD A. MORGAN,
Attorney for the Respondent,
Toledo, Peoria & Western
Railroad.